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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

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No. 76-1420

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STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY, Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK, Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# BRIEF FOR RESPONDENT EMPIRE NATIONAL BANK IN OPPOSITION

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April 20, 1977

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OPINIONS BELOW

Neither the opinion of the United States District Court (Exhibit A of Petition) nor the opinion of the United States Court of Appeals for the Second Circuit (Exhibit B of Petition) is officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Petition misstates the nature of the legal issue. In its statement of the question, the Petition implies that the Court of Appeals issued a writ of mandamus "merely because it disapproved of a jury charge which [the District] Court proposed to give." Petition, at 2. The opinion of the Court of Appeals (Exhibit B of Petition) shows the error of the question as framed by Petitioners.

Correctly stated, the issue is: Did the Court of Appeals exceed its authority under 28 U.S.C. §1651(a) in issuing a writ of mandamus to the District Court for the reason that it could not condone, under the unusual circumstances, the abrupt departure, especially during the jury's deliberations, from what the District Court acknowledged was "the existing federal rule with respect to trial by jury"? (See Exhibit A of Petition, at 2; Exhibit B of Petition, at 3).

## STATUTE INVOLVED

The pertinent statute is set forth in the Petition at page 3.

## STATEMENT OF THE CASE

The underlying action was commenced in 1971 in the United States District Court for the Southern District of New York. The plaintiffs, who are Petitioners in this Court, alleged three basic causes of action: first, a violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1970), and Rule 10b-5, 17 C.F.R. §240.10b-5 (1976), promulgated thereunder; second, common-law fraud; and third, breach of an agent's common-law duty of disclosure to the principal. Respondent Empire National Bank ("Empire") is the only party against which the aforesaid third cause of action is asserted.

The trial by jury of the underlying action began September 13, 1976. The jury, which is still deliberating, consists of six persons, as provided by Calendar Rule 22 of the United States District Court for the Southern District of New York, which states: "A jury for the trial of civil cases shall consist of six persons."



On March 28, 1977 the District Court charged the jury by reading instructions into the record. The trial transcript of the Court's charge is 160 pages in length and a full day was taken to instruct the jury. On several occasions during the charge, the Court directed the jury that any verdict must be reached by unanimous agreement. See Petitioners' Appendix to Motion for Expedited Consideration of Petition for Writ of Certiorari, II, Exhibit "C" ("Appendix to Petitioners' Motion"). Upon retiring on March 29, 1977 to begin deliberation, the Court provided each juror with a printed copy of the charge on which was affixed the juror's name. No motion was made by any party for a less than unanimous verdict until the sixth day of deliberations. At that time, April 5, 1977, the plaintiffs, after long observation of the charged jury, moved for a substitute charge, i.e., that five-sixths of the jury can return a verdict on any claim. On April 7, 1977 the District Court ruled that it would charge the jury that a verdict could be returned on the pendent common-law claims if five of the six jurors reached agreement. Exhibit A of Petition. The District Court recognized, however, that unanimity was required for any verdict on the fundamental, federal claims by virtue of which the District Court had subject matter jurisdiction. Exhibit A of Petition, at 2.

On April 11, 1977, after the District Court certified a question on its proposed five-sixths charge pursuant to 28 U.S.C. §1292(b),* the Respondents filed a petition for leave

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* The Certificate of Hon. Henry F. Werker, U.S.D.J., has been filed as item II, B, of Appendix to Petitioners' Motion, supra.

to appeal the District Court's order or, in the alternative, for a writ of mandamus or prohibition; a copy of that petition has been filed as item I of the Appendix to Petitioners' Motion, supra. On April 12, 1977 the Court of Appeals heard oral argument and ordered that a writ of mandamus issue. Consequently, the substitute charge to the jury was not given. The jury has continued to examine the evidence and to deliberate with the objective of arriving at a unanimous verdict. By their Petition in this Court, the Petitioners seek to overturn the well-reasoned opinion and proper order of the Court of Appeals. See Exhibit B of Petition.

## ARGUMENT

### THE GRANTING OF THE WRIT OF MANDAMUS BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WAS WITHIN ITS AUTHORITY AND WAS MANDATED BY THE EXTRAORDINARY CIRCUMSTANCES

The granting of a writ of mandamus, like equitable remedies, has long been held to lie within sound judicial discretion. The relevant test of the propriety of mandamus has been consistently held to be whether the granting or withholding of the writ was appropriate in light of all of the circumstances. La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25-26 (1943).

One situation in which mandamus is clearly appropriate is where there is a need to prevent abuse of discretion by a lower court. Mandamus is used not to control the decision of the lower court "but rather merely to confine the



lower court to the sphere of its discretionary power." Will v. United States, 389 U.S. 90, 104 (1967). Under this standard, a writ is appropriately issued in extraordinary cases where there is a "usurpation of judicial power" or "a clear abuse of discretion." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). A writ of mandamus is proper even if the order of the lower court is not final. Justice Black observed in Will v. United States, supra:

> And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Finality, then, while relevant to the right of appeal, is not determinative of the question when to issue mandamus. Rather than hinging on this abstruse and infinitely uncertain term, the issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order. 389 U.S. at 108 (concurring opinion).

It is respectfully submitted that the instant case presented the Court of Appeals with exceptional circumstances quite sufficient to justify the issuance of a writ of mandamus. The Court of Appeals recognized that the petition for a writ of mandamus set forth very exceptional circumstances as when, for example, the Court characterized the District Court's order of April 7, 1977 as an "extraordinary and unusual action." Exhibit B to Petition, at 2.

A second rationale for the use of mandamus is based on the responsibility of the courts of appeals to supervise

the district courts within the respective circuits. This Court has specifically recognized the responsibility of the courts of appeals to ensure the proper administration of justice in the federal courts. La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957). In Will v. United States, 389 U.S. 90 (1967), on which Petitioners place mistaken reliance, this Court recognized that had there been evidence that the deliberate disregard of federal criminal rules would be seriously disruptive of the efficient administration of justice in the district court, mandamus might well have been appropriate. 389 U.S. at 104-05.

In Will v. United States, supra, the Court of Appeals initially refused to issue a writ of mandamus, but then reversed its ruling and issued a writ without an opinion outlining any rationale. This is obviously not true in the instant case. Although Petitioners have described the United States Court of Appeals for the Second Circuit as having acted "cavalierly, on a hurry-up basis," Petition at 13, and giving the matter only "hurried, limited consideration," Petition at 10, review of the Court of Appeals' decision reveals a thorough understanding of what was actually occuring in the District Court and the need for the use of mandamus. See Exhibit B of Petition.

Because of the novelty of the District Court's decision allowing a five-sixths verdict in a federal action, the lower court certified the question pursuant to 28 U.S.C. §1292(b) for expedited appeal to the Court of Appeals. Certificate of Hon. Henry F. Werker, U.S.D.J., filed as item II, B, of Appendix to Petitioners' Motion, supra. The Court of



Appeals, upon review of the papers filed on the petition for interlocutory review and, in the alternative, for an appropriate writ, recognized the magnitude of the District Court's error and its far-reaching implications. After due deliberation, the Court of Appeals decided to issue a writ of mandamus rather than to respond to the certified question. See Exhibit B of Petition.

The opinion of the Court of Appeals demonstrates beyond peradventure that this is not a case where there issued a writ of "mandamus from the blue without rationale." See Will v. United States, 389 U.S. 90, 107 (1967)(Black, J., concurring). The Court of Appeals clearly grounded its decision to issue a writ of mandamus on two accepted bases: the District Court's gross abuse of discretion and the need to ensure orderly judicial functioning of the inferior courts within the Court of Appeals' jurisdiction. Exhibit B of Petition.

The Court of Appeals recognized that, regardless of the ultimate determination of the issue of jury unanimity, the abolition of that requirement after a main charge and a modified Allen charge requiring unanimity had been given, and after ten days of deliberation pursuant to those charges, was nothing more than "an expedient to extract a verdict at any cost." Exhibit B of Petition, at 2. As such, the District Court's action was an abuse of its discretion. Exhibit B of Petition, at 2. The Court of Appeals also noted that this unprecedented action was being taken in the face of indications that perhaps only a single hold-out survived the delivery of the modified Allen charge. The Court of Appeals viewed the proposed

substitute charge "as endangering the integrity of the jury function and the sanctity of deliberations once begun." Exhibit B of Petition, at 3. Either of the explicitly enumerated abuses of the District Court's discretion plainly called for a writ of mandamus.

Another rationale on which the Court of Appeals' decision was based is the need to prevent chaotic and arbitrary decisions by the several district courts of the Second Circuit. The Court of Appeals stated:

> It would be anomalous to observe one district court judge permitting a 5/6 verdict in pendent state claim cases or diversity of citizenship cases while all other judges required unanimity under similar circumstances for a verdict. Exhibit B of Petition, at 3.

Colgrove v. Battin, 413 U.S. 149 (1973), upon which Petitioners place much reliance involved a local district court rule which permitted a jury of six persons in civil cases. In the present case there is no local rule with respect to the requirement of unanimity. In effect the local district judge is making his own rule. Even assuming that a provision for a less than unanimous verdict were a proper subject for a local rule, it would take the majority of the district court judges sitting in a particular district and acting in accordance with their interstitial rulemaking powers to change or effect a local rule. A district judge, acting alone, has no authority in this area. See id., at 168 (Marshall, J., dissenting). Such an action could not be and was not sanctioned by the Court of Appeals and should not be sanctioned by this Court. Thus it is clear that the Court of Appeals was completely justified, under the circumstances, in issuing a writ of mandamus.



Petitioners have repeatedly asserted that they will be prejudiced by not having the five-sixths charge given because, even if ultimately sustained on appeal, once the jury is discharged, the instruction could not be given absent a new trial. This overlooks the fact that petitioners could have made their motion at any point during the trial prior to the time the jury was charged. If denied, an interlocutory appeal could then have been taken without the pressures necessarily attendant during jury deliberations. In short, if the petitioners had made a timely motion, they themselves could have averted the "prejudice" they now claim.

All parties and the District Court proceeded through trial on the understanding that a unanimous jury would be required for a verdict. The jury was repeatedly so charged. To change the instructions at this time so as to tell the jury a less than unanimous verdict can be returned on the common-law claims, but unanimity is still required on the federal allegations, would invite compounded confusion in the minds of jurors already laboring under a voluminous and complicated charge. The potential prejudice in such a situation is rife. Such prejudice was recognized by the main authority cited by petitioners for their extreme proposition and the five-sixths charge was rejected for that very reason. Wieser v. Chrysler Motors Corp., 69 F.R.D. 97, 101 (E.D.N.Y. 1975).

Although a petition for certiorari is not the appropriate vehicle for arguing the merits (see Petition at 11-12), Petitioners nevertheless contend that substantial authority supports the District Court's position. That is totally inaccurate. The District Court's decision was, as

Petitioners have aptly described it, nothing more than an "imaginative attempt . . . to salvage a verdict from a six-and-one-half month trial." Petition at 12. Although ostensibly premised on the "Erie doctrine as explained and expanded by Hanna and Byrd," Exhibit A of Petition at 3, the District Court's opinion merely adopted the narrow outcome determination test as originally expounded in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), which was significantly restricted and modified in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537-38 (1958). Thus to contend, as Petitioners do, that the District Court's decision accords with prior decisions of this Court is patently an error of oversimplification and oversight.

Petitioners also cite two decisions of this Court, Apodaca v. Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S. 356 (1972), as support for the position that jury unanimity is no longer required in federal courts. This is misleading because in both of the cited decisions rendered in companion cases, a majority of this Court made it clear that unanimity is still required by the Sixth Amendment to the United States Constitution in all federal criminal cases. See Johnson v. Louisiana, 406 U.S. 356, 395 (Brennan, J., dissenting). Apodaca v. Oregon, supra, and Johnson v. Louisiana, supra, simply do not support the radical proposition that unanimity is no longer required by the Seventh Amendment in federal civil cases.

## CONCLUSION

In view of the District Court's misconception of the Erie-Byrd-Hanna doctrine; the abrupt departure from the



traditional constitutional requirement of jury unanimity; the likely, resultant prejudice to Respondents; and all the extraordinary circumstances presented by this case, the Court of Appeals for the Second Circuit was fully justified in issuing a writ of mandamus. It is, therefore, respectfully submitted, and Empire prays, that the Petition should be denied by this Court.

Respectfully submitted,

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